Supreme Court, U.S.
FILED

No. 03-1167 DEC 8 - 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JERSON RAMOS CALUYA,

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner, Jerson Ramos Caluya, a native and citizen of the Philippines, applied for asylum in the United States in 1992. Because the individuals who assisted him in that process failed to notify him of any appointments, interviews or hearings associated with that application, Mr. Caluya was ordered deported without his knowledge. Upon discovery of that fact, Mr. Caluya filed a motion to reopen his case so that he may seek relief from deportation through his marriage to a U.S. citizen. That motion was denied.

1. Whether the Ninth Circuit Court of Appeals erred when it found that the Petitioner ("Caluya") failed to allege fraud or misconduct sufficient to entitle him to equitable tolling of the deadlines for filing a motion to reopen, and failed to provide any explanation for such findings, where no lower court or agency had determined the issue in light of the Ninth Circuit's intervening decision in a similar case, to wit: *Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002);

2. Whether the Ninth Circuit Court of Appeals erred when it refused to consider Caluya's argument that the Immigration Judge ("IJ") and the Board of Immigration Appeals ("BIA") applied the wrong standard in evaluating Caluya's Motion to Reopen where Caluya did not receive oral notice of the consequences of failure to appear; and

3. Whether the Ninth Circuit Court of Appeals erred when it refused to consider Caluya's argument that his Motion to Reopen was timely under 8 C.F.R. § 3.23(b)(4)(iii)(A)(2) because it was not raised in his opening brief.

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OPINIONS BELOW

The Immigration Judge in Los Angeles, California issued his decision in this case, File No. A70 210 869, on September 18, 2001. Appendix 11-13.

The decision of the Board of Immigration Appeals, File No. A70 210 869, issued on January 15, 2002, is unpublished. Appendix 7-10.

The Court of Appeals for the Ninth Circuit filed its decision in the form of an unpublished Memorandum on April 3, 2003. Appendix 5-6. An unpublished Order amending the April 3, 2003 Memorandum and denying Caluya's petitions for rehearing and rehearing en banc was filed September 8, 2003. The case number is 02-70215. Appendix 2-4.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued an Order and Amended Memorandum on September 8, 2003 denying Caluya's petitions for rehearing and rehearing en banc. App. 2-4.

Mr. Caluya now files this Petition for a Writ of Certiorari of the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

On December 16, 1993, an Immigration Judge ("IJ") ordered Mr. Caluya deported when he failed to appear for his immigration hearing. App. Through counsel, Mr. Caluya filed an Emergency Motion to reopen his case on or about

August 1, 2001. The IJ denied the motion on or about September 18, 2001. App. 11-13. Mr. Caluya timely filed an appeal with the BIA, and the BIA dismissed the appeal in a decision dated January 15, 2002. App. 7-10.

Pursuant to 8 U.S.C. § 1252(a)(1), Mr. Caluya timely filed a Petition for Review with the Court of Appeals for the Ninth Circuit. In support of his petition Mr. Caluya submitted Petitioner's Opening Brief, Petitioner's Reply Brief, and Petitioner's Supplemental Brief. On April 3, 2003 a panel of the Ninth Circuit issued a Memorandum denying Mr. Caluya's Petition for Review. App. 5-6.

On May 15, 2003 Mr. Caluya timely filed a Petition for Rehearing and a Petition for Rehearing En Banc. Both petitions were denied in an Order and Memorandum issued September 8, 2003. App. 2-4.

Statement of Facts

Mr. Caluya entered the United States on January 1, 1992, at Tampa, Florida by way of the ship MS Nieu Amsterdam. He was authorized to remain until July 10, 1992. Mr. Caluya traveled to Las Vegas, Nevada because he had friends and relatives there. Sometime later in the month of January 1992, Mr. Caluya filed an application for asylum with the assistance of a Philippino couple living in Bakersfield, California. The names of the Philippino couple were Emy Ines and Jun Nunco. App.

The Service sent an asylum appointment notice to the post office box of Emy Ines and Jun Nunco sometime after the asylum application was filed. Mr. Caluya never received that appointment notice. App.

The Service Asserts that someone responded to the appointment notice with a letter requesting an extension and that the letter was signed by Mr. Caluya. However, Mr.

Caluya never wrote, signed, nor authorized such a letter. App. The request for an extension was granted, but Mr. Caluya failed to appear at the rescheduled asylum interview. App.

The asylum application was then denied, and the case was referred to the Immigration Court at Los Angeles. The INS issued an Order to Show Cause why Mr. Caluya should not be deported on July 23, 1993. The officer who issued the Order to Show Cause certified that it was not read to Mr. Caluya in the Tagalog language, the alien's native language. However, Mr. Caluya never received any notice of any kind regarding a hearing before the Immigration Court. An IJ at the Court ordered Mr. Caluya deported in absentia on December 16, 1993. App. 11-13

On February 19, 1994, Mr. Caluya was assisted by a lady named Edith de la Canal. Rather than checking for any deportation orders, Ms. Canal advised Mr. Caluya to file another asylum application. Ms. Canal prepared another asylum application for Mr. Caluya and filed it for him. App. Although Ms. Canal seemed to be affiliated with attorney Steven Finston in some way, Mr. Caluya did not speak with Mr. Finston.

Mr. Caluya did not learn of the deportation order against him until July 30, 2001.

On April 29, 2003, the Bureau of Citizenship and Immigration Services (BCIS - formerly the INS) approved an immediate relative petition filed by Mr. Caluya's U.S. citizen spouse on his behalf. On remand, this case can be sent back to the BIA for consideration of Mr. Caluya's Motion to Reopen, so that it may ultimately be returned to the IJ to allow the filing of an application for adjustment of status based on the alien's marriage to a U.S. citizen.

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The Ninth Circuit's intervening decision in *Fajardo*

During the pendency of Mr. Caluya's appeal to the Ninth Circuit, that court issued a major decision directly on point with respect to Mr. Caluya's case. *Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002). There, the Ninth Circuit held that the time limit in which to file a motion to reopen an in absentia deportation order was equitably tolled until *Fajardo* discovered the harm caused by the misconduct of those she sought to assist her with her asylum case.

The facts of the present case and those in *Fajardo* are remarkably similar. Both individuals were natives of the Philippines. Both applied for asylum in this country in 1992. Both sought the assistance of non-attorney individuals who claimed to have experience in such immigration matters. In both cases the people assisting the aliens listed their own address as that of the alien on the applications. In both cases the alien was never notified of appointments, interviews, or hearings associated with their asylum applications. As a result, in both cases the alien was ordered deported in absentia without any idea that such actions were taking place in their respective cases.

Unfortunately, the similarities do not end with the deportation orders. Both Ms. Fajardo and Mr. Caluya sought further help from other non-attorney individuals, who claimed to be able to assist them with their immigration matters, to try to rectify their immigration situations. In both cases these contacts proved to be as harmful as their initial sources of assistance. In both cases it was not until the aliens were able to retain the assistance of actual attorneys that they became aware of the extent of the harm caused by the misrepresentations and inappropriate actions of those who had provided the earlier assistance.

Where the similarity ends, however, is how these two cases were resolved. In Ms. Fajardo's case the Ninth Circuit

remanded to the BIA for a determination of whether the actions of the individuals who first assisted her, in failing to notify her of any events related to her deportation proceedings, constituted exceptional circumstances excusing her failure to appear such that her motion to reopen her proceedings should be granted.

In the present case, the Ninth Circuit dispensed with all of the foregoing similarities without distinguishing Mr. Caluya's case from Ms. Fajardo's in any way. Instead, the Ninth Circuit simply stated that, "Caluya has failed to allege fraud or misconduct sufficient to entitle him to equitable tolling of either of these filing deadlines. *Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002)."

REASONS WHY CERTIORARI SHOULD BE GRANTED

Review is warranted because of the serious consequences Petitioner may face if deported, and the Ninth Circuit failed to explain its reasoning beyond stating a conclusion

This case involves fundamental issues regarding justice, fairness, and equity. The consequence to Mr. Caluya of the decision by the Ninth Circuit is deportation from the United States. For an individual facing deportation, it is a serious matter. *See Lehmann v. United States*, 353 U.S. 685, 691 (1957) (Black, J., concurring) ["To banish (an immigrant) from home, family and adopted country is punishment of the most drastic kind."]; *Padilla-Agustin v. INS*, 21 F.3d 970, 978 (9th Cir. 1994) [When an alien faces the threat of deportation the stakes are high. He may face deprivation, torture or even death when he is returned to his homeland].

Mr. Caluya applied for asylum shortly after entering the United States, but due to the misrepresentation and

failure of those who undertook to represent him to apprise him of any of his required appearances, has never had his application for asylum decided on the merits. Therefore the risk faced by Mr. Caluya should he be deported has not been determined under United States immigration law.

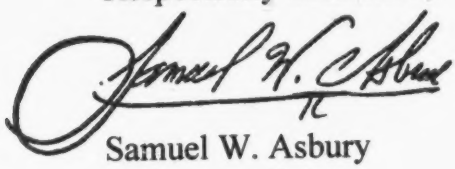
In the face of such potentially serious and dramatic consequences, the Ninth Circuit failed to explain its decision beyond mere conclusions. This Court should review this case to insure Mr. Caluya's contentions receive adequate consideration before he is subjected to the dire consequence of deportation.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Ninth Circuit Court of Appeals.

Dated: December 8, 2003

Respectfully submitted,



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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Sep – 8 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JERSON RAMOS CALUYA, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 02-70215 INS No. A70-210-869 Central District of California, Los Angeles ORDER

Before: D.W. NELSON, WARDLAW and FISHER, Circuit Judges.

The Panel has voted to amend the memorandum disposition filed April 3, 2003 and to deny petitioner's petition for rehearing. Judges Wardlaw and Fisher have voted to reject the petitioner's petition for rehearing en banc and Judge Nelson so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Clerk of the Court is directed to file the attached memorandum disposition.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Sep – 8 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JERSON RAMOS CALUYA, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 02-70215 INS No. A70-210-869 Central District of California, Los Angeles AMENDED MEMORANDUM*[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted February 5, 2003**[**]
Pasadena, California

Filed April 3, 2003
Amended September 8, 2003

Before: D.W. NELSON, WARDLAW and FISHER, Circuit Judges.

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* This Disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Jerson Ramos Caluya Petitions for review of the Board of Immigration Appeals's [sic] decision upholding the denial of his untimely motion to reopen his case. The BIA determined that, prior to being ordered deported *in absentia*, Caluya received notice of the deportation hearing, and that he was not entitled to equitable tolling of the motion to reopen deadline [sic]. We have jurisdiction pursuant to 8 U.S.C. § 1105a (repealed 1996) to review the BIA's order, and we deny the petition.

We lack jurisdiction to review Caluya's assertion that the IJ and BIA erred under *In re M-S-*, 22 I. & N. Dec. 349 (B.I.A. 1998)(en banc), in applying the wrong standard in evaluating his motion, because he raises this argument for the first time before us. *See Cortez-Acosta v. INS*, 234 F.3d 476, 480 (9th Cir. 2000). We simply note that Caluya's motion was untimely be either standard, as it was filed nearly seven years after the *in absentia* deportation order was entered. 8 C.F.R. § 3.23(b)(4)(iii)(A)(1) (motions to rescind must be filed within "180 days [from] the date of the [*in absentia* deportation] order" if the alien wishes to demonstrate that his "failure to appear was because of exceptional circumstances"); *id.* § 3.23(b)(1) (motions to reopen "must be filed within 90 days of the date of entry of a final administrative order of ... deportation"). Caluya has failed to allege fraud or misconduct sufficient to entitle him to equitable tolling of either of these filing deadlines. *Fajardo v. INS*, 300 F.3d 1018, 1020-21 (9th Cir. 2002.

Caluya's assertion that his motion was nevertheless timely under 8 C.F.R. § 3.23(b)(4)(iii)(A)(2) because he never received actual notice of his deportation hearing, even though the Immigration Court sent him notice by certified mail, is waived because he raised it for the first time in his supplemental brief. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996).

DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
APR 03 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JERSON RAMOS CALUYA, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 02-70215 INS No. A70-210-869 MEMORANDUM*

On Petition for Review of an Order of the
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Submitted February 5, 2003**
Pasadena, California

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Jerson Ramos Caluya Petitions for review of the Board of Immigration Appeals's [sic] decision upholding the denial of his untimely motion to reopen his case. The BIA determined that, prior to being ordered deported *in absentia*, Caluya received legally sufficient (if not actual) notice of the deportation hearing,[1] and that he was not entitled to equitable tolling of the motion to reopen deadline [sic]. We have jurisdiction pursuant to 8 U.S.C. § 1105a (repealed 1996) to review the BIA's order, and we deny the petition.

We lack jurisdiction to review Caluya's assertion that the IJ and BIA erred under *In re M-S-*, 22 I. & N. Dec. 349 (B.I.A. 1998)(en banc), in applying the wrong standard in evaluating his motion, because he raises this argument for the first time before us. *See Cortez-Acosta v. INS*, 234 F.3d 476, 480 (9th Cir. 2000). We simply note that Caluya's motion was untimely be either standard, as it was filed nearly seven years after the *in absentia* deportation order was entered. 8 C.F.R. § 3.23(b)(4)(iii)(A)(1) (motions to rescind must be filed within "180 days [from] the date of the [*in absentia* deportation] order" if the alien wishes to demonstrate that his "failure to appear was because of exceptional circumstances"); *id.* § 3.23(b)(1) (motions to reopen "must be filed within 90 days of the date of entry of a final administrative order of ... deportation"). Caluya has failed to allege fraud or misconduct sufficient to entitle him to equitable tolling of either of these filing deadlines. *Fajardo v. INS*, 300 F.3d 1018, 1020-21 (9th Cir. 2002.

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[1] The Immigration Court sent the notice by certified mail to the address Caluya had provided in his asylum application and subsequent request for employment authorization, and the return receipt was returned signed to the court. Such notice is legally sufficient. *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997).

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041
File: A70 210 869-Los Angeles Date: JAN 15 2002

In re: JERSON RAMOS CALUYA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Samuel Asbury, Esquire

ORDER:

PER CURIAM. The respondent's appeal of an Immigration Judge's September 18, 2001, decision denying his motion to reopen following a hearing held on December 16, 1993, in which the respondent was ordered deported in absentia is dismissed.

An order of deportation issued following proceedings conducted in absentia pursuant to section 242Bc of the Immigration and Nationality Act may be rescinded only upon a motion to reopen which demonstrates that the alien failed to appear because of exceptional circumstances, because he did not receive proper notice of the hearing, or because he was in Federal or State custody and failed to appear through no fault of his own. Section 242Bc(3) of the Act. *See Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995).[1]

[1] The respondent also contends that the Immigration Judge erred in not applying the "reasonable cause" standard pursuant to section 242(b) of the Act. However, section 242B of the Act applies to cases, such as the respondent's, where the notice of hearing was made on or after June 13, 1992, the effective date for deportation procedures specified in section

A claim of exceptional circumstances must be filed within 180 days after the date of the order of deportation. 8 C.F.R. § 3.23(b)(4)(iii)(a)(1) (2001).

The respondent asserts in both his motion to reopen and on appeal that he never received notice of his hearing, and that reopening is warranted on that basis. In this regard, he alleges that the Order to Show Cause and notice of hearing were sent to the home of a couple who had helped him complete his asylum application, but where he did not reside. He asserts that the couple failed to forward any notices to him.

The Order to Show Cause reflects that it was sent by certified mail to the address listed by the respondent in his application for asylum; 13337 East South Street, #276, in Cerritos, California.[2] Of record is a May 1992 application for employment authorization filed by the respondent, in which he identified the noted address as his own, and which he signed under penalty of perjury, certifying that the information provided was "true and correct." No change of address form is of record. On August 1, 2001, more than seven years after the Immigration Judge's in absentia decision, the respondent submitted a motion to reopen proceedings.

An Immigration Judge has authority to conduct a hearing in absentia in deportation proceedings where the respondent fails to appear, and the Immigration Judge is satisfied that notice of the time and place of proceedings was provided to the respondent by written notice to the most recent address in the Record of Proceeding. 8 C.F.R. §

242B of the Act. *See Matter of Cruz-Garcia*, Interim Decision 3420 at n. 1 (BIA 1999).

[2] Although a copy of the respondent's original application for relief is not of record, in his August 2001 motion the respondent conceded that he provided the noted address as his own in that document (Motion to Reopen at 7).

3.26(a). In *Matter of Grijalva*, 21 I&N Dec. 27, 33 (BIA 1995), we interpreted this to mean "that certified mail of such notice of deportation proceedings which is sent to the respondent's last known address is sufficient and that proof of actual service or receipt of notice by the respondent is not require." Moreover, where "notice of deportation proceedings is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises. *Id.*, at 37.

In this case, the respondent's Order to Show Cause and hearing notice were sent by certified mail to the address identified in two separate forms by the respondent as his own. There is no indication that the Order to Show Cause was returned as undeliverable, and the certified return receipt for the hearing notice was signed for by a person at that address. Moreover, we note that the copy of the Immigration Judge's decision, which was sent to that same address, was not returned as undeliverable. Given these facts, we agree with the Immigration Judge that the respondent received legally adequate notice. Therefore, the Immigration Judge properly had jurisdiction over the instant matter. As the respondent received legally adequate notice, his motion to reopen on the basis of exceptional circumstances was untimely and the Immigration Judge properly denied it on that basis. Moreover, the Immigration Judge properly found *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) to be inapplicable, contrary to the respondent's generalized assertion otherwise. In this regard we note that case is distinguishable from the that [sic] of the alien in that case as the respondent has provided no evidence whatsoever regarding any agreement he may have had with the couple who allegedly helped him prepare his application for relief, nor has he alleged a claim of ineffective assistance of

counsel or of fraud. As such we do not find the noted case to be relevant to the instant matter.

As we find no merit to the respondent's arguments on appeal, the following order shall be entered.

ORDER: The appeal is dismissed.

s/ Edward R. Grant

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

SEP 18 2001

File No.: A 70 210 869 In the Matter of: CALUYA, Jerson Ramos	IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(1)(B) of the Immigration and Nationality Act ("Act") – Alien entered without inspection

APPLICATION: Motion to Reopen

On Behalf of the Respondent:
Samuel W. Asbury
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Gresham, OR 97030

On Behalf of the Service:
Assistant District Counsel
Los Angeles, California

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

PROCEDURAL HISTORY

Respondent is a native and citizen of the Philippines who was admitted on January 11, 1992 as a non-immigrant with authorization to remain in the United States for a temporary period not to exceed July 10, 1992. Respondent remained longer than authorized. On July 23, 1993, the Immigration

and Naturalization Service ("INS") issued on Order to Show Cause ("OSC") against respondent, charging him with deportability under section 241(a)(1)(B) of the Act.

Respondent failed to appear for his hearing on December 16, 1993. the Immigration Judge found respondent deportable on the charges contained in the OSC and ordered him deported to the Philippines. On August 1, 2001, respondent filed a motion to reopen and motion for change of venue. On August 2, 2001, this Court issued an emergency stay of deportation pending the adjudication of respondent's motion to reopen.

DISCUSSION

An order entered *in absentia* in deportation proceedings may be rescinded only upon a showing of either "exceptional circumstance," insufficient notice or custody. If respondent can demonstrate that his failure to appear was due to exceptional circumstances, such as serious illness of the alien or serious illness or death of the spouse, child or parent of the alien, but not including less compelling circumstances beyond his control, he may file a motion to reopen up to 180 days after the date of the order. If respondent demonstrates that he did not receive legally sufficient notice of the hearing, or that he was in federal or state custody, he is not subject to any time bar for filing a motion to reopen. See 8 C.F.R. § 3.23(b)(4)(ii); INA § 240(e)(1).[1] Respondent claims that he did not receive his OSC or notice of his hearing because of notary fraud.

Respondent claims that he never received notice of his hearing because the hearing notice and OSC were sent to

[1] Respondent claims that the "reasonable cause" standard should apply to him. However, respondent's Order to Show Cause clearly shows that respondent was warned that the applicable standard was the "exceptional circumstance" on set forth in section 242B of the Act.

the notary's address, and the notary failed to tell him about the hearing. Former INA § 242B(a)(2)(A) of the Act provides that written notice of hearing shall be given in person to the alien, or through service by certified mail to the alien or the alien's counsel of record. Service is sufficient if provided at the most recent address provided by respondent. Former INA § 242B(3)(c). The record shows that the OSC was sent on July 23, 1993 by certified mail to respondent at 13337 East South St. #276, Cerritos, California 90701. This was the address provided by respondent on his asylum application dated May 15, 1992. This was the last address provided by respondent. Notice of the hearing was sent on November 2, 1993 to the same address. The certificate of service was signed by someone at that address and returned to the Court. Even though respondent claims he never received notice, notice was sufficient.

Respondent also claims that he is a victim of notary fraud because the notary did not inform him of the hearing date. However, this claim of "exceptional circumstances" is untimely, as respondent failed to file it within 180 days of entry of the order of deportation. See 8 C.F.R. 3.23. Equitable tolling cannot apply to waive the filing deadline in this case because respondent did not file the motion to reopen within 180 days of discovering the fraud. See Lopez v. INS, 184 F.3d 1097 (9th Cir. 1999). Respondent states that on July 24, 1994, he consulted an attorney and found out that his application had been denied because he had never shown up for any interview. However, respondent waited until 2001 to file his motion to reopen.[2]

Furthermore, before a motion to reopen will be granted, respondent must establish a prima facie case of eligibility for the relief sought at the reopened hearing. INS v. Abudu, 485 U.S. 94, 104 (1988); Matter of Coelho, 20 I&N Dec. 464 (BIA 1992). The motion to reopen must state

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[2] Respondent waited for six years after discovery of the alleged notary fraud to file hi motion to reopen, and only after he believed himself eligible for some relief. His claim is disengenious [sic] and untimely.

the new facts that will be proven at the hearing to be held of the motion is granted and must be supported by affidavits and other evidentiary material. INA § 240©(6)(B). Respondent claims that he is married to a United States citizen and is eligible for adjustment of status. Respondent has not submitted any evidence in support of such an application for relief.

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that respondent's motion to reopen be DENIED.

Date: SEP 18 2001

s/ Thomas Y.K. Fong
Thomas Y.K Fong
U.S. Immigration Judge